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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

EDDIE SPRAGGINS,

Petitioner,

v.

WALTER D. ZANT, WARDEN,
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether or not the submission of an additional statutory aggravating circumstance to the jury upon Petitioner's resentencing trial, constituted a violation of the Fifth Amendment ban against double jeopardy or of Petitioner's right to due process.

II.

Whether the implementation of the death sentence in this case and the affirmance of same by the Georgia Supreme Court had been accomplished in such a manner so as to insure said sentence was free from arbitrariness and capriciousness and was not disproportionate.

III.

Whether it was necessary for the trial court to give limiting and explanatory instructions relating to the punishment phase of Petitioner's trial in regard to Ga. Code Ann. § 27-2534.1(b)(7), and in the absence of said instructions, whether the Supreme Court of Georgia properly reaffirmed Petitioner's death sentence.

IV.

Whether the trial court's instructions to the jury during the sentencing phase of Petitioner's trial, when considered as a whole, sufficiently informed said jury that they could consider all of the circumstances of the case, including mitigating circumstances, and that they could impose a life sentence even though they found the existence of statutory aggravating circumstances.

V.

Whether or not Peititioner received effective assistance of counsel.

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PART ONE

STATEMENT OF THE CASE

This is the third time this case has come before this Court on a petition for writ of certiorari. Petitioner, Eddie Spraggins, was indicted along with co-defendant Freddie Davis, by the February Term, 1977, Meriwether County, Grand Jury for the murder and rape of Frances Coe. Following a jury trial on March 1-2, 1977, in which Petitioner was separately tried from his co-defendant, Petitioner was found guilty on both counts, and was sentenced to death for the murder conviction and to life for the rape.

As a result of Petitioner's conviction in 1977, an appeal was taken to the Supreme Court of Georgia. Said Court upheld Petitioner's conviction, but granted him a new trial as to sentencing. The Court found that the jurors had not been adequately instructed during the sentencing phase of Petitioner's trial, because the trial court's sentencing instructions failed to make it clear to the jury that they could recommend a life sentence even if they found the existence of a statutory aggravating circumstance, and also failed to adequately inform the jury that they were authorized to consider mitigating circumstances. Spraggins v. State, 240 Ga. 759, 763, 243 S.E.2d 10 (1978). [Hereinafter referred to as Spraggins I].

On May 22, 1978, a new jury for resentencing was selected, and after being presented with substantially the same evidence which the State had presented in Spraggins I, that jury again sentenced Petitioner to death for the murder of Ms. Coe. The Supreme Court of Georgia on appeal from the resentencing trial affirmed Petitioner's death penalty. Spraggins v. State, 243 Ga. 72, 252 S.E.2d 620 (1979). [Hereinafter referred to as Spraggins II]. On May 27, 1980, certiorari was granted by

this Court, the Georgia Supreme Court's affirmance of Petitioner's death penalty was vacated, and the case was remanded for further review by the Georgia Supreme Court in light of this Court's recent decision in Godfrey v. Georgia, 446 U.S. 420 (1980). Spraggins v. Georgia, 446 U.S. 961 (1980).

Upon remand, the Georgia Supreme Court again reaffirmed Petitioner's death sentence. Spraggins v. State, 246 Ga. 432, 281 S.E. 828 (1980). Thereafter, Petitioner filed a second petition for a writ of certiorari in this Court. This second petition was denied, Spraggins v. Georgia, 451 U.S. 910 (1981), as was a motion for rehearing. Spraggins v. Georgia, 452 U.S. 932 (1981).

Thereafter on July 22, 1981, a new execution date was set for August 3, 1981. A stay of execution was granted when Petitioner filed a state habeas corpus petition in the Superior Court of Butts County, Georgia. Following an evidentiary hearing, the Butts County Superior Court, in an order dated January 4, 1982, denied habeas relief. Petitioner's application for a certificate of probable cause to appeal was denied by the Georgia Supreme Court on February 17, 1982, and he then filed this third petition for a writ of certiorari.

PART TWO

STATEMENT OF THE FACTS

On January 31, 1922, the body of the victim, Ms. Frances Coe, was discovered in her home in Meriwether County, Georgia. During the trial, Georgia Bureau of Investigation Officer Bert Davis described the condition of the murder victim as follows: "On the bed on the right, Ms. Coe was lying with her head in the direction of the wall, and her feet down onto the floor. She was in a semi-nude condition, panties and panty hose had been pulled down and were still attached to the left foot. She wore a slip which was pulled up here in the area of the breast and had on a green sweater which was open. There were numerous lacerations to the throat. It was cut just practically out. Further examination revealed a deep cut here in her eye which appeared to be a bruise type cut and not a slash. Numerous stab marks and slashes in the chest area and a slash mark on her breast, slash marks in the abdomen area on the left side, one approximately 5 inches. From the top of the vagina up through the navel, Ms. Coe was split open. The intestines were pulled from the stomach and lying on top of her stomach." (T. 40, Spraggins I).

The autopsy which was later performed revealed that the cause of death was due to a loss of blood. There were several wounds to the body which caused the victim to bleed heavily, with the most severe stab wounds being in the upper abdomen and lower chest, including two in the upper abdomen which penetrated the heart. There was also evidence that there had been some manipulation to the victim's sexual organs.

Particularly, there were two areas of injury in the vicinity of the vaginal opening. The second injury consisted of bruising around the vaginal orifice. The autopsy further indicated that there was a considerable amount of hemorrhaging around the urethra, as well as there being a small tear in the vaginal orifice.

During the course of the investigation the law enforcement officers were led to the yard of the Petitioner's residence. With the consent of the Petitioner's mother the law enforcement officers uncovered from a pile of ashes, a zipper and cloth material which appeared to come from a jacket, as well as a flashlight which had recently been borrowed from the victim. The search of Petitioner's yard was occasioned by virtue of the fact that a neighbor, on the night of the murder, had seen something burning there.

A Georgia Bureau of Investigation agent later confronted Petitioner with the evidence which he had gathered on Ms. Coe's murder. After being advised of his rights, Petitioner voluntarily chose to give a statement. In that statement he implicated Freddie Davis by stating that Davis went to Frances Coe's house on Sunday, January 30, 1977. Petitioner stated that he had been talking about robbing Ms. Coe for quite some time. Petitioner went to the front door of the Coe residence while Davis remained at the back door. In order to gain entrance into Ms. Coe's house he fabricated the excuse that he wanted to use her telephone. Upon gaining entrance, Petitioner attempted to force Ms. Coe to open the back door, but she refused and began to scream. Petitioner proceeded to grab Ms. Coe around the neck and opened the door in order to permit Davis to gain entrance.

Petitioner then dragged Ms. Coe to the bedroom while at the same time keeping his hand over her mouth to prevent her from screaming. Davis told Petitioner to "shut her up." While making this remark Davis handed Petitioner a knife, following which Petitioner proceeded to stab Ms. Coe as well as to cut her throat. Petitioner told the officers that Ms. Coe would not die, and that he kept cutting her. Davis egged him on stating, "You got to finish her off." After eventually subduing Ms. Coe, Petitioner stated that he wiped the blood from his hands, and gave the knife back to Davis. Davis then used the victim's flashlight in order to search for money. Later, behind his house, Petitioner burned the windbreaker that he was wearing. Davis returned the flashlight to the Petitioner after they left Ms. Coe's house.

Additional facts will be recited in the following portion of this brief when necessary to more fully explain Respondent's arguments.

PART THREE

REASONS FOR NOT GRANTING THE WRIT

I. THE SUBMISSION TO THE JURY OF AN ADDITIONAL STATUTORY AGGRAVATING CIRCUMSTANCE AT PETITIONER'S RETRIAL ON SENTENCING, AND THE JURY'S FINDING OF SAME, NEITHER SUBJECTED PETITIONER TO DOUBLE JEOPARDY NOR VIOLATED HIS RIGHTS TO DUE PROCESS AND A FUNDAMENTALLY FAIR TRIAL.

Under Petitioner's first and second reasons for granting the writ, and under his first argument in support thereof, he raises an issue pertaining to the trial court's permitting the district attorney to present evidence on an additional statutory aggravating circumstance which was not specifically submitted to the jury nor found at Petitioner's initial trial. After Petitioner's death sentence was reversed by the Supreme Court of Georgia on his first direct appeal (Spraggins I), Petitioner was returned to the Superior Court of Meriwether County for a new trial on sentencing. In the first trial, the district attorney submitted for the jury's consideration, the statutory aggravating circumstance that the murder was committed while the Petitioner had been engaged in the commission of another capital felony, that being the rape of Ms. Coe. See Ga. Code Ann. § 27-2534.1(b)(2). Prior to resentencing the district attorney gave notice to the Petitioner orally and in writing that the State would be seeking the death penalty under Georgia's seventh aggravating circumstance [Ga. Code Ann. § 27-2534.1(b)(7)], as well as under the (b)(2) aggravating circumstance.[1/]

1/ Of course, as this Court is well aware Georgia's (b)(7) aggravating circumstance permits a jury to impose the death penalty upon a finding that a murder is outrageously or wantonly vile, horrible and inhuman in that it involved torture, aggravated battery or depravity of mind. Georgia's (b)(2) aggravating
(FOOTNOTE CONTINUED ON NEXT PAGE)

Following the resentencing trial, the jury returned its verdict finding that the state had proven beyond a reasonable doubt the existence of the (b)(7) aggravating circumstance. Petitioner argues that this constituted double jeopardy, and that the state should have been prohibited from adding an additional aggravating circumstance at the subsequent resentencing trial. Petitioner also asserts that the addition of the (b)(7) aggravating circumstance upon Petitioner's retrial, was a violation of Ga. Code Ann. § 27-2503 and resulted in a fundamentally unfair proceeding.

This Court may initially note that these exact same issues were raised on Petitioner's direct appeal following resentencing (Spraggins II), and upon Petitioner's first and second petitions for writ of certiorari in this Court. Petitioner makes the same arguments that he made in his first and second petitions, and cites no new reasons why certiorari should be granted now after it had previously been rejected on these same issues twice before.

As has been previously noted, in reviewing Petitioner's case on direct appeal following resentencing, the Georgia Supreme Court found there was no double jeopardy violation as a result of the trial court's submission of an additional aggravating circumstance for the jury's consideration at resentencing. (Spraggins II, supra at p. 75-76). The ruling

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(FOOTNOTE 1 CONTINUED FROM PREVIOUS PAGE)

circumstance requires a finding that the murder was committed while the offender was engaged in the commission of another capital felony or while the offender was engaged in the commission of burglary or arson in the first degree. Rape is considered a capital felony for the purposes of Ga. Code Ann. § 27-2534.1(b)(2). See Peek v. State, 239 Ga. 422, 432, 238 S.E.2d 12 (1977).

in Spraggins has more recently been upheld by the Georgia Supreme Court in the recent cases of Godfrey v. State, 248 Ga. 616, 284 S.E.2d 422 (1981); and Zant v. Redd, 249 Ga. 211, ___ S.E.2d ___ (1982). In Godfrey, the defendant had initially been convicted of murder and received a death penalty based upon the jury's finding of the existence of the (b)(7) aggravating circumstance. Upon review by this Court, Godfrey's death sentence was vacated and remanded for further proceedings. Godfrey v. Georgia, 446 U.S. 420 (1980). Upon remand to the Superior Court for resentencing, the jury returned another verdict in favor of the death penalty, finding the existence of the (b)(2) aggravating circumstance.

Citing Burks v. United States, 437 U.S. 1 (1978); Bullington v. Missouri, ___U.S.___, 101 S.Ct. 1852 (1981); Price v. Georgia, 398 U.S. 323 (1970); United States v. Ball, 163 U.S. 662 (1896); Redd v. State, 242 Ga. 876, 252 S.E.2d 383 (1979); Davis v. State, 242 Ga. 901, 252 S.E.2d 443 (1979); Spraggins v. State, 243 Ga. 73, 252 S.E.2d 620 (1979) and Green v. State, 246 Ga. 598, 272 S.E.2d 475 (1980), the Georgia Supreme Court found that the retrial and subsequent imposition of Godfrey's second death sentence did not violate his constitutional rights. The court specifically found that since the reversal in Godfrey was solely upon legal grounds, the retrial on sentencing was not for the purpose of affording the prosecution another opportunity to supply evidence which it failed to muster at the first proceeding. As in the instant case, in Godfrey the court recognized that at the initial sentencing proceeding, there was sufficient evidence which would have supported the jury's finding of an additional aggravating circumstance. Additionally, the court placed emphasis upon the jury's initial recommendation of the death penalty which it noted as a distinguishing feature

from Bullington, supra. The Georgia court went on to state:

> "Appellant further argues that since the state limited its case to the single aggravating circumstance [(Code Ann. § 27-2534.1 (b)(7)] at the initial trial, it is barred from seeking a death penalty on any other aggravating circumstance. We do not agree. Double jeopardy not attaching under the circumstance, the original sentence, at the appellant's behest, has been nullified. The state and defense start anew. See North Carolina v. Pearce, 395 U.S. 711 (89 S.C. 2072, 23 L.Ed.2d 656) (1969); Bullington v. Missouri, supra; Redd v. State, supra. Therefore, the state is not limited to the aggravating circumstances relied upon at the first hearing. Spraggins v. State, supra; Davis v. State, supra; Green v. State, supra." Godfrey v. State, supra at p. 619.

Following the affirmance of Petitioner's new death penalty, Godfrey filed a petition for writ of certiorari in this Court, raising the same issues as Petitioner Spraggins has raised under his first argument relating to the addition of a new statutory aggravating circumstance not relied upon at the first trial. Certiorari was denied on April 5, 1982, and rehearing was denied on May 24, 1982. Godfrey v. Georgia, ___U.S.___, 102 S.Ct. 1778 (1982), rehng. denied, ___U.S.___, 102 S.Ct. 2286 (1982).

In Zant v. Redd, 249 Ga. 211, ___ S.E.2d___ (1982) only three aggravating circumstance were initially submitted to the jury at Redd's first sentencing trial. The jury imposed the death sentence,but listed only one aggravating circumstance in support thereof. Following a reversal of Redd's death penalty, he was retried on sentencing, and at this second sentencing trial the jury was instructed that it was authorized to consider four aggravating circumstances - the three submitted to the first jury plus an additional one. Id. at p. 211-212.

In considering the factual situation in Redd in light of Bullington v. Missouri, supra, the Georgia Supreme Court found that the basis of the Bullington decision was that the procedure involved in sentencing under Missouri's death penalty statute closely resembled that of a trial on guilt or innocence. In Bullington this court indicated that the Missouri sentencing procedure required the jury to determine that the state had actually proved its case when seeking to impose the death penalty. Consequently, the sentence of life amounted to an acquittal of the death penalty. Thus, when the defendant in Bullington initially received a life sentence, he could not again be retried on sentencing and receive the death penalty.

However, the rationale of Bullington does not apply to a simple finding of statutory aggravating circumstances. Under the statute in Georgia, there is only a requirement that the jury find at least one aggravating circumstance in order to impose the death penalty. Zant v. Redd, supra at p. 213. In the instant case, the jury was so instructed.

Thus, the decision by the jury was not a mutually exclusive one in regards to the choice of life or death. Under Georgia law the state and the defense start anew at a resentencing hearing. Aggravating circumstances are simply procedural standards designed to control a jury's discretion in capital cases in order to insure against a capricious and arbitrary enforcement of the death penalty. They are not substantive "penalties" or "offenses", they do not place the defendant's life in peril or subject him to a possible "conviction" but are simply standards which guide the jury's decision on which sentence to impose. Zant v. Redd, supra at p. 213-214. Therefore, the state is not limited to the aggravating circumstances relied upon at the first hearing. Godfrey v. State, supra at p. 619; Zant v. Redd, supra at p. 214.

It is important to note here that the jury was simply considering circumstances which authorized and justified imposition of the death penalty. As was held in North Carolina v. Pearce, 395 U.S. 711 (1969), a defendant may be retried when his conviction has been set aside because of any error which led to his conviction, and absent a vindictive motive by the trial court, a greater sentence may be imposed if justified. Id., at p. 720, 723, cf. Stroud v. United States, 215 U.S. 15 (1919). In deciding on the imposition of the second sentence, the double jeopardy clause does not preclude the sentencing judge from considering new evidence and information that was not considered in the first trial. North Carolina v. Pearce, supra at p. 723.

The jurors in Petitioner's first trial were neither asked to consider nor instructed on Georgia's seventh statutory aggravating circumstance. Petitioner appears to argue that the failure of the trial court to submit or the jury's failure to find same constituted an implied acquittal under that aggravating circumstance. However, since the (b)(7) circumstance was not submitted to the jury, the jury obviously could not have acquitted the Petitioner thereof. See generally, Hardwick v. Doolittle, 558 F.2d 292, 297-298 (5th Cir. 1977), cert. den., 434 U.S. 1049 (1977). There is also no evidence to indicate that the district attorney's action in submitting an additional statutory aggravating circumstance in this case resulted from any vindictiveness. The Petitioner was not subjected to the potential for a greater conviction, and his retrial did not subject him to a greater punishment than that imposed at his first trial.

Petitioner's argument that the submission of Georgia's seventh aggravating circumstance to the jury violated Georgia's statutory law (Ga. Code Ann. § 27-2503)[2/] also does not require review on certiorari by this Court. The argument that Ga. Code Ann. § 27-2503 had been violated by the submission of the (b)(7) aggravating circumstance to the jury, was not considered nor ruled upon by the Georgia Supreme Court and was not argued or considered by the state habeas court, and should not be considered now for the first time. Cardinale v. Louisiana, 394 U.S. 437 (1969); Tacon v. Arizona, 411 U.S. 531 (1973).

2/ The pertinent portion of Ga. Code Ann. § 27-2503 relating to presentence hearings in felony cases, states that: "In such hearing the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior coviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible."

Additionally, it must be noted that there was no objection filed prior to trial relating to the addition of the (b)(7) aggravating circumstance, nor was there an objection when the court submitted the same during its charge to the jury. The question of whether Code Section 27-2503 had been violated, is really a question of state statutory interpretation on an evidentiary question, and does not rise to constitutional magnitude.

Here, the (b)(7) aggravating circumstance naturally turned upon the facts which were proven during the retrial. Approximately one month prior to the resentencing trial, the prosecution informed the defense orally and in writing, at a formal hearing, that the death penalty would be sought under the (b)(7) and (b)(2) aggravating circumstances, and that the evidence relating to the Petitioner's participation in the crime would be the same as was produced in the first trial. The defendant was represented by the same attorney at both his original trial and resentencing.

Under these facts Petitioner had more than ample notice of the aggravating circumstances which the state intended to prove.

For all of the aforesaid reasons, Respondent urges this Court to reject Petitioner's first argument.

II. THE GEORGIA STATUTORY PROCEDURES FOR THE IMPLEMENTATION OF THE DEATH PENALTY, AND THE GEORGIA SUPREME COURT'S REVIEW OF PETITIONER'S CASE THEREUNDER, SUFFICIENTLY PROTECTED PETITIONER'S RIGHT TO BE FREE FROM AN ARBITRARY, CAPRICIOUS OR A DISPROPORTIONATE SENTENCE.

Petitioner's second argument in support of the issuance of the writ of certiorari in this case, asserts that this Court's mandates as set out in Furman v. Georgia, 404 U.S. 238 (1972), and Gregg v. Georgia, 428 U.S. 153 (1976) were violated and circumvented by the alleged introduction of prejudicial, improper evidence, prosecutorial comment before the jury and by the lack of an adequate review by the Georgia Supreme Court under its mandatory appellate process in death penalty cases.[3/] These exact same arguments were also previously made in the first and second petitions which were filed in this Court on behalf of Petitioner. As with his first argument, Petitioner makes no new arguments and cites no new authority which would now make the granting of certiorari appropriate.

Since a review of the record amply demonstrates that the objected to evidentiary items were properly admitted, that the prosecutor's arguments violated neither Georgia law nor were they so grievous as to violate Petitioner's fundamental due process rights to a fair trial, and since it is evident the

3/ Ga. Code Ann. § 27-2537(c) directs that the Georgia Supreme Court, on the appeal of a death penalty case, must determine: "(1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor, and (2) Whether, in cases other than treason or aircraft highjacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in Section 27-2534.1(b), and (3) Whether the sentence of death is successive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Georgia Supreme Court's review complied with the requirements of the aforesaid Georgia statute, this Court should decline to grant the writ based upon Petitioner's arguments contained under his second heading.

Under subsection A of Petitioner's second argument he focuses upon the introduction into evidence of alleged inflammatory or improper photographs of the victim, and contends that the introduction of said photos, when combined with the statements made by the prosecutor, operated to "arouse the jury's fear and prejudice and . . . appeal to the jurors' sense of terror and outrage." (Petitioner's Brief, p. 14).

First, relating to the photographs of the victim; it is clear that under Georgia law that photographs which are material to issues at trial, and which depict the nature and extent of the victim's wounds and injuries are admissible for the jury's consideration. See, Bowden v. Zant, 239 Ga. 821, 825, 238 S.E.2d 905 (1977), cert. den., 435 U.S. 937 (1978); Franklin v. State, 245 Ga. 141, 148, 263 S.E.2d 666 (1980), cert. den., ___U.S.___, 100 S.Ct. 3029 (1980).

On Petitioner's retrial the sole question before the jury related to the issue of sentencing, and whether the state had proven the existence of any of the statutory aggravating circumstances beyond a reasonable doubt so as to potentially justify a death penalty. One of the aggravating circumstances submitted to the jury on this retrial, for their consideration related to Ga. Code Ann. § 27-2534.1(b)(7), which authorizes the death penalty when the jury finds beyond a reasonable doubt that the murder ". . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." In determining this issue and generally, in weighing the heavy responsibility relating

to the imposition of the death penalty, most certainly the jury is authorized to view the extent and the nature of the victim's wounds or injuries. Quite often words and oral descriptions are simply inadequate to accurately convey the nature of the crime. As is often said, a picture is worth a thousand words.

Normally, the admission of photographs does not rise to constitutional dimension. Talbot v. Nelson, 390 F.2d 801 (9th Cir. 1968), cert. den., 393 U.S. 868 (1968). Their admission rests within the sound discretion of the trial judge, notwithstanding the fact that they may be gruesome or shocking. United States v. Hoog, 504 F.2d 45 (8th Cir. 1972), cert. den., 420 U.S. 961 (1975); United States v. Shoemaker, 542 F.2d 561 (10th Cir. 1976), cert. den., 429 U.S. 1004 (1976). Here, the probative value of the photos used in the jury's individualized sentencing procedure, outweighed any prejudicial effect to the Petitioner, and thus they were properly admitted. United States v. Kaiser, 545 F.2d 464, 476 (5th Cir. 1977).

Petitioner also argues that the prosecutor's cross-examination of the Petitioner and his closing argument were improper under Ga. Code Ann. § 27-2206,[4/] and worked in conjunction with the aforesaid admission of photographs to unconstitutionally prejudice

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4/ Ga. Code Ann. § 27-2206 reads as follows: "No attorney at law in a criminal case shall argue to or in the presence of the jury that a defendant, if convicted, may not be required to suffer the full penalty imposed by the court or jury, because pardon, parole, or clemency of any nature may be granted by the Governor, State Board of Pardons and Paroles, or other proper authority vested with the right to grant clemency. If counsel for either side in a criminal case should so argue to the jury, opposing counsel shall have the right to immediately request the court to declare a mistrial; and in which case, it shall be mandatory upon the court to declare a mistrial; and upon failure to do so, same shall constitute reversible error.

This section shall be construed as setting forth regulations in addition to those provided for in Section 24-3319 and Section 81-1009."

the Petitioner by allegedly influencing the jury to render an arbitrary or capricious verdict.

Regarding the cross-examination questions put to the Petitioner, as evidenced on page 13 of Petitioner's brief, it is first important to note that the defense offered no objections during the trial relating to said questions. Also the question of improper cross-examination was not raised on direct appeal, and was not considered by the Georgia Supreme Court. This Court has ruled that federal constitutional issues raised for the first time on appeal from a state court decision will normally not be heard. Cardinale v. Louisiana, 394 U.S. 437 (1969); Tacon v. Arizona, 410 U.S. 531 (1973); also see, 28 U.S.C. 1257.

The Georgia Supreme Court, however, did review the question of whether the prosecutor's closing arugments to the jury violated the aforesaid Code Section 27-2206, and concluded that there was no such violation. Spraggins v. State, 243 Ga. at p. 74. As noted in the previous section of this brief, normally the decision of the highest state court on questions of state law are dispositive, absent an obvious intent to evade the consideration of a federal issue or to frustrate due process. Mullaney v. Wilbur, 421 U.S. 684 (1975). Here the prosecutor's argument, as cited on page 14 of Petitioner's brief fell within the permissible limits of Code Section 27-2206. Under established Georgia law the argument of counsel, and particularly the latitude which will be afforded to counsel during closing argument, rests within the broad discretion of the trial judge. See, Hart v. State, 227 Ga. 171, 173, 179 S.E.2d 346 (1971); Hinton v. State, 138 Ga. App. 702, 227 S.E.2d 474 (1976).

When the state is seeking the death penalty, it is not improper for the prosecutor to argue for the imposition of same or to give plausible reasons for his position. Chenault v. State, 234 Ga. 217(7), 215 S.E.2d 223 (1975); Strickland v. State, 209 Ga. 675(2), 75 S.E.2d 6 (1953); Allen v. State, 187 Ga. 178, 182, 200 S.E. 709 (1938).

In the instant case it appears the district attorney was simply arguing that the protection and safety of the community justified the need for the death penalty in this case. The district attorney did not mention the term pardon, parole, executive clemency or the potential for Petitioner's release in any other manner. Comments similar to those utilized in this case have consistently been held not to violate the statute. See, Redd v. State, 242 Ga. 876, 880, 252 S.E.2d 383 (1979), cert. den., 222 U.S. 934 (1979); Mason v. State, 236 Ga. 46, 49, 222 S.E.2d 339 (1976), cert. den., 428 U.S. 910 (1976). Furthermore, the trial court insured that there was no potential or prejudice by adequately instructing the jury. (T. 282).

Petitioner also argues that the combination of the above, plus the alleged inadequate instructions by the trial court prior to the jury's deliberations, operated to permit the jury to exercise unbridled discretion in the Petitioner's sentencing. This argument is also unmeritorious. Contrary to Petitioner's assertions, the jury was instructed adequately, and in accordance with the requirements of the Georgia statutory scheme as approved by this Court in Gregg v. Georgia, supra.

Of course, the jury is entitled to consider all of the evidence and the facts and circumstances of the case and the background of the petitioner in making its decision. This is the basis for the individualized sentencing as required by Gregg and the recent case of Lockett v. Ohio, 98 S.Ct. 2954 (1978). Here, the Petitioner was found guilty of brutally murdering the victim in this case, and the evidence amply showed that while in the process he horribly mutilated her body. It was perfectly permissible for the jury to actually see the consequences of the Petitioner's actions, and to consider his past record and the potential for a repeat performance.

An examination of the trial court's sentencing instructions (Petitioner's Appendices) demonstrates that Petitioner's rights were amply protected, and this Court should find no merit to his arguments that the trial court's evidentiary rulings and instructions contributed to an arbitrary decision.

Finally, Petitioner's arguments that the Georgia Supreme Court's review on appeal has been inadequate is without evidence in the record to support it, is conclusory, and is simply speculative. The Georgia court indicated that it considered the aggravating circumstances found by the jury, the evidence which was introduced in court concerning the crime and the defendant, and thoroughly reviewed the record and the transcript. Likewise, the Georgia Supreme Court compared the instant case with other death penalty cases, and concluded that the sentence was not excessive or disproportionate in considering both the crime and the defendant. Spraggins v. State, 243 Ga. at pp. 75-76. Thus, the Georgia Supreme Court's review was sufficient. Also see, Spraggins v. State, 246 Ga. 432, 281 S.E.2d 828 (1980).

III. THE SUPREME COURT OF GEORGIA PROPERLY REAFFIRMED PETITIONER'S DEATH SENTENCE UNDER GA. CODE ANN. § 27-2534.1(b)(7) IN LIGHT OF GODFREY V. GEORGIA, 446 U.S. 420, 100 S.CT. 1759 (1980).

Following Petitioner's retrial on sentencing the jury returned a death penalty verdict based upon its finding that the murder in this case was outrageously and wantonly vile, horrible and inhuman in that it involved torture, an aggravated battery to the victim and a depravity of mind on the part of the defendant. Ga. Code Ann. § 27-2534.1(b)(7).

Petitioner asserts, under his third argument, that the Supreme Court of Georgia acted outside of its scope of authority in reaffirming Petitioner's death sentence under that aggravating circumstance upon remand from this Court. Specifically, Petitioner asserts that the Georgia Supreme Court should have ordered a new jury sentencing proceeding to be conducted by the Georgia Supreme Court upon remand was improper, because the jury which imposed the death penalty under the aforesaid statute was unguided as to the meaning and application of said statute. These arguments were also raised in the first two petitions for certiorari filed by Petitioner. Although the second of the aforesaid arguments was presented to the state habeas court, the first contention pertaining to the propriety of the reaffirmance of Petitioner's death penalty in the absence of a new sentencing proceeding following remand from this Court was not presented to the state habeas court.

It is important to note that following Petitioner's retrial on sentencing, the Georgia Supreme Court considered the death penalty as it was required to do under Georgia law. Ga. Code Ann. § 27-2537. Under this provision, the Georgia Court is authorized and directed to conduct an appellate review of the sentence imposed by the trial court. The initial decision following resentencing

affirmed Petitioner's death penalty after reviewing the record and transcript of Petitioner's trial and after considering both the crime and the defendant. Spraggins v. State, 243 Ga. at p. 75-76. Following the submission of the first petition for certiorari which was filed on behalf of Mr. Spraggins, this Court vacated the decision of the Georgia Supreme Court affirming Petitioner's death penalty, and remanded for consideration in light of the recent decision in Godfrey v. Georgia, supra. Thus, upon remand, the Supreme Court was merely reconducting its appellate review of the death penalty under Ga. Code Ann. § 27-2537. The Georgia Supreme Court did not reimpose the death sentence, but merely reaffirmed the one which had already been imposed by the Meriwether County jury. Spraggins v. State, 246 Ga. 432 (1980).

Respondent asserts that the Supreme Court of Georgia at no time acted as a sentencing authority, but merely conducted its appellate review examining the record to see if there was sufficient evidence to support the finding of the aggravating circumstance. Contrary to Petitioner's assertions, the remand by this Court in light of Godfrey did not require that another, new sentence proceeding be held.

Furthermore, contrary to Petitioner's assertions, there was no requirement that the Georgia Supreme Court permit Petitioner to file his briefs or conduct oral argument prior to said Court's review of this case following remand from this court on May 27, 1980. As previously noted, upon remand the Georgia Supreme Court merely conducted a portion of its previous appellate review in more detail and in light of Godfrey. The Georgia Supreme court at that time, had before it the complete record of Petitioner's trial, which included all of the information necessary to review the jury's finding on Ga. Code Ann. § 27-2534.1 (b)(7). The decision as to whether or not to allow oral argument

and additional breifing was within the sound discretion of the Georgia Court and does not rise to a constitutional violation under the facts of this case.

Godfrey v. Georgia, supra specifically dealt with the application of Ga. Code Ann. § 27-2534.1(b)(7) in that case. The jury in Godfrey recommended a death sentence based upon a partial finding under (b)(7) that the murder of the victim had been "outrageously or wantonly vile, horrible and inhuman." This Court held that there was nothing in these few words, standing alone, that implied any inherent restraint upon the arbitrary and capricious infliction of the death sentence. Godfrey at p. 1765.

In the instant case, the jury made a complete finding under the (b)(7) aggravating circumstance, and as opposed to Godfrey, the wording of the jury's finding in this case is sufficiently definite to insure against any arbitrary or capricious infliction of the death sentence, and the record as reviewed by the Georgia Supreme Court, demonstrated ample evidence to support the jury's finding that the victim suffered from torture, aggravated battery and that the Petitioner had demonstrated his depravity of mind beyond all reasonable doubt.

Petitioner additionally asserts that his death penalty should be reversed, because the jury which imposed his present death sentence had not been instructed as to the terminology and meaning of the terms under the (b)(7) code section. Respondent respectfully submits that the absence of any explanatory or limiting instructions relating to (b)(7) was not error and did not harm the Petitioner under the facts of this case. Unlike Godfrey the finding by the jury in this case of torture, aggravated

battery and depravity of mind leaves no doubt as to the jury's interpretation of (b)(7). Thus, the Georgia Supreme Court was not forced to speculate as to the jury's finding. Notwithstanding the trial court's failure to expound on the terminology of (b)(7), Petitioner's right to be free from an abritrary and capricious decision under that code section was protected through the appellate review process by the Georgia Supreme Court both on direct appeal and following remand from this Court.

At the time Petitioner's trial was reviewed on remand by the Georgia Supreme Court, said Court already had before it the benefit of this Court's opinion in Godfrey, and was able to apply its mandates in light of the facts and circumstances of this case. Here, since the jury made a sufficiently specific finding regarding the (b)(7) aggravating circumstance and since the Georgia Supreme Court adequately performed a thorough review under the facts of this case to insure said findings were sufficiently supported by the record, this Court can determine that the absence of limiting or explanatory instructions relating to the meaning of the individual terms contained in aggravating circumstance (b)(7) did not disadvantage the Petitioner or deprive him of any of his constitutional or statutory rights.

IV. THE TRIAL COURT'S INSTRUCTIONS DURING THE RESENTENCING PHASE OF PETITIONER'S TRIAL DID NOT SUFFER FROM ANY CONSTITUTIONAL DEFICIENCY AS URGED BY THE PETITIONER.

As noted previously, Petitioner's first death sentence was specifically reversed by the Georgia Supreme Court, because the trial judge, during the sentencing phase of Petitioner's trial, failed to instruct the jury that they could recommend a life sentence even if they found the existence of statutory aggravating circumstances, and further failed to inform the jury that they were authorized to consider mitigating circumstances in making their decision on the death penalty. Spraggins v. State, 240 Ga.759, 763 (1978). Petitioner again argues under his fourth argument that his death sentence following his sentencing retrial is still constitutionally defective in that the trial judge, in his written instructions to the jury, neither charged that the jury could consider mitigating circumstances nor that they could impose a life sentence even though aggravating circumstances were found to be present. Similarly to the previous three arguments tendered by Petitioner, this argument was also raised in the first two petitions which had been filed on behalf of Mr. Spraggins.

Petitioner does not assert that the trial court's oral instructions were erroneous, but focuses solely upon the written instructions which were submitted to the jury. In essence he argues that the trial judge's written instructions so overshadowed and outweighed his oral instructions, that this Court must presume that the oral instructions were either ignored by the jury or rendered ineffectual. Contrary to Petitioner's

assertions, there is absolutely no reason to assume that the jury did not give proper weight and consideration to the trial judge's oral instructions, especially when said instructions were delivered immediately before the jury deliberations began. As evidenced by Petitioner's Appendix E, the trial judge made absolutely certain that the flaws which had caused reversal of Petitioner's first sentence, were cured in this retrial. For example, the trial judge instructed as follows:

> "Under the laws of this State, every person guilty of the offense of murder shall be punished by life imprisonment or death by electrocution. In all cases for which the death penalty may be authorized, the law provides the judge shall instruct the jury concerning any evidence in extenuation, mitigation and aggravation, which the jury may consider in making their decision as to what punishment is to be imposed upon the defendant.
>
> In reaching your determination you are authorized to consider all of the evidence received by you in open court.
>
> You are authorized to consider all of the facts and circumstances of the case.
>
> Ladies and Gentlemen of the jury, in reaching your verdict you are authorized to consider all of the facts and circumstances, if you find there be any, in mitigation of punishment. In determining whether

mitigating circumstances exist, you are authorized to consider all of the evidence produced by the State and the defendant throughout this trial.

Mitigating circumstances are those circumstances which do not constitute a justification or excuse for the crime but which may be considered as extenuating or reducing the moral culpability or blame.

In reaching this verdict, you are not required to find mitigating circumstances in order to recommend the sentence of life in prison. You may recommend a sentence of life imprisonment regardless of whether or not you believe mitigating circumstances exist in this case." (T. 296-297).

* * *

"Now, Ladies and Gentlemen of the jury, a list of these aggravating circumstances that the State contends exist in this case are listed on a piece of paper and will be out with you in the jury room during your deliberations.

Ladies and Gentlemen of the jury, if you do not find that the State has proved at least one of these statutory aggravating

circumstances beyond a reasonable doubt, then you must recommend a sentence of life imprisonment.

If you should find that the State has proved at least one of the statutory aggravating circumstances beyond a reasonable doubt, then you still may, if you so choose, recommend a sentence of life imprisonment.

If you find that the State has proved at least one of the statutory aggravating circumstances beyond a reasonable doubt, then you may recommend that the death penalty be imposed, but you are not required to do so." (T. 299).

The trial court's written instructions which were given to the jury are set out in Petitioner's Appendix F. These instructions simply inform the jury which aggravating circumstances they were authorized to consider from the evidence. Contrary to Petitioner's assertions, Ga. Code Ann. § 27-2534.1(c)[5/] does not require identity content in the oral and written charges. In interpreting Code § 27-2534.1(c) the Georgia Supreme

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5/ Ga. Code Ann. § 27-2534.1(c) reads as follows: "The statutory instructions as determined by the trial court to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation. The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft highjacking, unless at least one of the statutory aggravating circumstances enumerated in Section 27-2534.1(b) is so found, the death penalty shall not be imposed."

Court has recognized that the written material to be furnished to the jury is purely of a procedural nature, and amounts to nothing more than a formulation of the jury's potential verdicts. Collier v. State, 244 Ga. 553, 509, 261 S.E.2d 364 (1979), cert. den., ___U.S.___, 100 S.Ct. 1346 (1980); McCorquodale v. State, 233 Ga. 369, 377, 211 S.E.2d 577 (1974), cert. den., 428 U.S. 910 (1976).

It is a normal procedure for the trial court, in a criminal case, to instruct the jury as to the particular form that its verdict should assume, once the jury's determination has been made as to the guilt or innocence of a particular defendant. The statutory provision in question merely standardizes the manner in which the practice shall be administered in cases in which a death penalty may be appropriate. Due to the complexity of the Georgia death penalty procedure, and the requirement that the jury designate in writing the particular aggravating circumstance or circumstances it found beyond a reasonable doubt, the Georgia Legislature recognized the necessity of giving the jury a written formulation of its potential verdict.

The operation of this procedure in the instant case did not harm the Petitioner, but only served to clarify to the jury that the death penalty would not be authorized unless it found that at least one of the aggravating circumstances had been proven by the State beyond a reasonable doubt. The interpretation of Ga. Code Ann. § 27-2534.1(c) by the Georgia Supreme Court was reasonable, and is not intended to deprive Petitioner of any of his constitutional or statutory rights. The Georgia Supreme Court's ruling should therefore be controlling on this issue. Mullaney v. Wilbur, 421 U.S. 684, 691 (1975); Wainwright v. Sykes, 433 U.S. 72, 82 (1977).

It has long been held that a trial court's instructions to the jury should be considered, not in artificial isolation, but should be considered as a whole, and in light of the context of petitioner's entire trial. Cupp v. Naughten, 414 U.S. 141, 146-147 (1973); United States v. McLaurn, 580 F.2d 811, 812 (5th Cir. 1978); United States v. Blevins, 555 F.2d 1236, 1239 (5th Cir. 1977). Here, when the trial judge thoroughly and properly instructed the jury orally immediately prior to their deliberations, it is sheer speculation to argue, as does the Petitioner, that said oral instructions would be disregarded or ignored.

V. THE STATE HABEAS COURT'S FINDING THAT PETITIONER RECEIVED EFFECTIVE ASSISTANCE OF COUNSEL WAS SUPPORTED BY SUBSTANTIAL EVIDENCE PRESENTED AT THE STATE HABEAS EVIDENTIARY HEARING.

Under Petitioner's final argument he sets forth several areas wherein he claims he received ineffective assistance of counsel. A review of the record of Petitioner's trial, and a review of the testimony at the state habeas proceeding, shows that the state habeas court properly found that Petitioner failed to carry his burden of proof on this issue. The findings of the state habeas court are reflected in Petitioner's Exhibit B, pages 2 through 4.

A review of the entire record and Attorney Belcher's testimony at the state habeas evidentiary hearing shows that trial Attorney Belcher thoroughly investigated Petitioner's case, spoke with Petitioner on several occasions, spoke with the investigating police officers, canvassed the scene of the crime and attempted to find favorable witnesses and evidence, obtained Petitioner's school records, and spoke with his family. Attorney Belcher did not petition the court for funds for an independent psychiatric examination, because he was satisfied that the Petitioner had received an adequate examination by the court appointed psychiatrist. He had no reason to doubt the report from Central State Hospital on Petitioner's psychiatric condition. Petitioner mistakenly informs this Court that counsel presented no evidence during the special plea hearing. A review of the hearing

transcript demonstrates that one witness was called to testify on behalf of the Petitioner.

Contrary to Petitioner's bald assertions, Mr. Belcher's conduct during trial, including the voir dire of jurors was adequate. The record shows that Attorney Belcher adequately presented Petitioner's defense, adequately cross-examined state witnesses, and adequately made objections and presented arguments. Petitioner claims that at the resentencing trial Attorney Belcher failed to ask prospective jurors as to their knowledge of the first trial or its outcome; however, a review of the prosecutor's statutory questions presented to the jury demonstrates that this area was adequately covered. Also, contrary to Petitioner's assertions, the district attorney's arguments did not deprive Petitioner of a fundamentally fair trial, and Mr. Belcher's failure to object to specific portions of same did not constitute ineffective assistance.

The standard for effective assistance under the Sixth Amendment to the United States Constitution appears to be well established, and simply must be applied to the facts of each particular case. A criminal defendant is entitled to representation by an attorney reasonably likely to render and rendering reasonably effective assistance. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981); Jones v. Estelle, 622 F.2d 124 (1980). As noted recently by this Court in Cuyler v. Sullivan, 446 U.S. 335 (1980), the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution attaches whether or not counsel was appointed or retained. The standard does not require errorless counsel, nor counsel judged ineffective

by hindsight. United States v. Johnson, 615 F.2d 1125 (5th Cir. 1980); Clark v. Blackburn, 619 F.2d 431 (5th Cir. 1980). The totality of the circumstances surrounding the trial, and the entire record must be considered in examining the performance of counsel. See, e.g., Lovett v. State of Florida, 627 F.2d 706 (5th Cir. 1980); Lee v. Hopper, 499 F.2d 456 (5th Cir. 1974).

Here, contrary to Petitioner's assertions, a review of the actions of Attorney Belcher, when viewed in light of the entire record, amply demonstrates that Petitioner received effective assistance of counsel in accordance with the federal standard. Thus, certiorari should not be granted to review the final issue which Petitioner raises.

CONCLUSION

For all of the above and foregoing reasons, Respondent respectfully submits that this Court should deny Petitioner's request for a writ of certiorari.

Respectfully submitted,

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